STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARC LEROY BOASKO,

Defendant-Appellant.

UNPUBLISHED
January 31, 2008

No. 272312
Jackson Circuit Court
LC No. 05-001334-FH

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of embezzlement of property worth $20,000 or more, MCL 750.174(5)(a), one count of false pretenses valued at $1,000 or more but less than $20,000, MCL 750.218(4)(a), and five counts of embezzlement of property worth $1,000 or more but less than $20,000, MCL 750.174(4)(a). Defendant appeals as of right, challenging the latter five convictions, and also the scoring of certain of his sentencing variables. We affirm defendant's convictions, but remand for the ministerial task of correcting the sentencing information report. This case is being decided without oral argument in accordance with MCR 7.214(E).

I. Basic Facts

For two years, defendant was employed by the Les Stanford Automotive Group as the used vehicle manager. During this time, defendant incurred serious gambling debts, and resorted to embezzlement to pay them.

The convictions of embezzlement over $20,000 stemmed from two bulk purchases of vehicles defendant arranged, whereby he submitted invoices to his employer with inflated prices, the totals being enough to cover all vehicles including two that were left off the lists, each worth over $20,000. Defendant then asked his employer to purchase those latter vehicles by writing a check to a corporation in which his bookie was part owner, who applied the proceeds to defendant's gambling debt.

The conviction of false pretenses stemmed from defendant's having submitted bills to his employer for detailing services on several vehicles that in fact never left the employer's lot. A check was made out to a used car dealer, and deposited into an account shared by that dealer and defendant's wife. Defendant and his wife withdrew those funds.

The convictions defendant challenges stem from defendant's having arranged for the aforementioned used car dealer to purchase several used vehicles from his employer at low prices. The used car dealer then sold them at auction for much higher prices and tendered the profits to defendant.

II. Convictions

Defendant moved the trial court for summary dismissal of his five counts of embezzlement of property worth $1,000 or more but less than $20,000, on the ground that the evidence was insufficient to prove that the cars in question had sufficient value at the time of his conversion of them to reach the dollar limit required for that felony. Defendant argued that the eventual resale prices reflected detailing he had done between acquisition and resale. The trial court denied the motion on the ground that the evidence presented a question for jury resolution concerning value at the time of conversion.

Because defendant's motion for dismissal was brought as a challenge to the sufficiency of the evidence, the motion is properly regarded as one for a directed verdict. When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

Embezzlement by an agent occurs when the principal entrusts something of value to the agent, who then dishonestly disposes of or converts it to his own use without the principal's permission, while intending to defraud or cheat the principal. See *People v Collins*, 239 Mich App 125, 131; 607 NW2d 760 (1999).

On appeal, defendant reiterates his argument that the evidence in this case was insufficient to prove the value of the property converted in connection with the five challenged convictions, asserting that the profits he achieved stemmed entirely from improvements of the vehicles for which he had arranged.

As an initial matter, we note that, were we to credit defendant's arguments, the remedy would not be acquittal, but rather a downgrading of his convictions to misdemeanor embezzlement, MCL 750.174(2) and (3). See *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001) (an appellate court may, upon finding insufficient evidence to support a conviction, vacate that conviction and direct the trial court to enter a conviction of a necessarily included lesser offense). In this case, defendant challenges none of the elements of embezzlement per se, but only the valuation element required for conviction of that crime at the felony level, MCL 750.174(4)(a).

Defendant correctly points out that the value of the thing embezzled is its value when it was converted. See *Stoddard v Manufacturers Nat'l Bank*, 234 Mich App 140, 146; 593 NW2d 630 (1999). But defendant additionally asserts that the ultimate sale price of the vehicles in question cannot be considered as evidence of what their value was when converted shortly before. We disagree.

Defendant protests that he "should not be penalized for adding value to the cars through his actions." But neither should he be able to immunize himself from felony embezzlement by taking actions after improperly acquiring property that makes it harder to determine that property's market value at the time of conversion. Beyond that, the jury was not obliged to believe the testimony that defendant had in fact succeeded in improving the vehicles in question at all, let alone to the full extent of the profits he made from their eventual sale. In fact, the jury could well have inferred that defendant simply used his influence and knowledge to buy low and sell high.

For these reasons, we hold that the trial court properly ruled that the evidence was sufficient to allow the jury to decide the question of the embezzled vehicles' values at the time of conversion.

III. Sentencing

Defendant asserts that the trial court misscored offense variables 9, 13, and 14 when calculating the recommended range for his minimum sentence under the sentencing guidelines. We review a sentencing court's factual findings for clear error. See MCR 2.613(C); *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995). However, the proper application of the statutory sentencing guidelines presents a question of law, calling for review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

A criminal defendant has a Due Process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990), citing US Const, Am XIV, § 1, and Const 1963, art 1, § 17. Moreover, "[c]ritical decisions are made by the Department of Corrections regarding a defendant's status based on the information contained in the presentence investigation report." *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986).

At sentencing, the trial court indicated the intention to assess ten points for offense variable (OV) 14, as prescribed for a defendant who acted as a leader in a multiple offender situation. MCL 777.44(1)(a). Defense counsel protested that this was not a multiple offender situation. The trial court replied that "there was clearly others involved in this . . . that I think had a pretty good idea that there was something fishy going on." The evidence that defendant conducted his embezzling activities through a bank account in the name of his wife and the used car dealer involved supports the trial court's conclusion in this regard. A scoring decision will not be reversed if any evidence exists to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

However, defendant's sentencing information report shows a score of zero points for OV 14, but ten points for OV 9, which concerns numbers of victims, and which the trial court agreed should be scored at zero points to reflect only a single victim. MCL 777.39(d). It is thus apparent that the score for OV 14 was inadvertently presented as that for OV 9. Although correcting that oversight does not change the totals for purposes of determining the guidelines range, we remand this case to the trial court for the ministerial task of making those corrections.

Defendant additionally challenges his score for OV 13, which concerns continuing patterns of criminal behavior. The trial court assessed ten points, which is the number prescribed where the offending conduct involved membership in an organized criminal group, MCL 777.43(1)(d), which is obviously inapplicable, or where the offending conduct was part of a pattern of felonious activity involving a combination of three or more crimes against a person or property, MCL 777.43(1)(c). The instant case concerned crimes against property only, not any combination involving persons. Plaintiff confesses error in this regard, agreeing that five points, as prescribed where the offending conduct was part of a pattern involving three or more crimes against property, is the correct score. Accordingly, we instruct the trial court on remand to make this adjustment as well.

Resentencing is not required, however, because adjusting defendant's score for OV 13 from ten to five points drops the OV total from 30 to 25 points, which keeps the OV level at III. See MCL 777.65. Because this brings about no change in the guidelines range, resentencing is not required. *People v Francisco*, 474 Mich 82; 711 NW2d 44 (2006).

Affirmed, but remanded for corrections in the sentencing information report. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood